

LAW OFFICES

NEMIROW HU & SHEA

A PROFESSIONAL CORPORATION

1629K Street, N.W.

SUITE 500

WASHINGTON, D.C. 20006

SAMUEL B. NEMIROW
LOREN CLAUDEA HU (1951-1992)
TIMOTHY B. SHEA

TELEPHONE: (202) 835 0300
TELECOPIER: (202) 835 0306

By Fax # (202) 690-2221

March 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512
Attention: Mr. Richard Chavez

Re: Notice at 70 *Fed. Reg.* 74717 (December 17, 2005), 7 CFR Part 1496,
Procurement of Commodities for Foreign Donation -- Proposed Rule

Dear Mr. Chavez.

We are writing on behalf of Sealift, Inc. of Oyster Bay, New York in response to the subject notice. Sealift owns and operates eleven US flag vessels at least three of which regularly trade in the carriage of cargoes sponsored by USDA / CCC under Title II and other programs governed by the subject rules. Sealift has a vital interest in the administration of these programs, and, in particular, the procedures to be used in a submission and evaluation of bids in connection with the procurement of commodities for donations overseas.

Introduction

Sealift is grateful for the extension of time granted to commenters to permit an open meeting on the subject of this rulemaking. Sealift believes that the meeting was useful for many purposes, particularly USDA's commitment to work with Marad and the industry in developing the rules and to educate the industry with respect to the implementation of any rule that may emerge. The recognition of USDA officials that the system is a complex work-in-progress requiring careful testing was also constructive.

It remains Sealift's position, nevertheless, that the information available to the industry on this proposal is so limited that we lack the requisite information to formulate comments. The amendments to the rule are a precursor to adoption of a one-bid system. Both administrative and programmatic changes are contemplated by the amendments. We are unsure, however, as to how much the technical changes are influencing the programmatic changes or the other way around. We are equally concerned about unintended changes that may flow from what are considered to be administrative constraints and mandates. Therefore, as we noted in the open meeting, we urge formation of a government and industry working

group to craft a protocol for a side-by-side test of the two systems so that all interested parties -- including USDA -- can evaluate the import of the changes contemplated.

Legal Setting

The Administrative Procedure Act requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted. 5 U.S.C. § 553(b)-(c). These requirements, which serve important purposes of agency accountability and reasoned decisionmaking, impose a significant duty on the agency. Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment. The agency must make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule. See *American Medical Association v. Reno*, 57 F 3d 1129, 1132, 1133 (D.C. Cir. 1995). The notice-and-comment requirement helps to ensure that the rule is subjected to thoroughgoing analysis and critique by interested parties and the agency. *Id.* at 1134. The notice and comment provision cannot be turned into a "bureaucratic game of hide and seek." *MCI Telecommunications Corp. v. FCC*, 57 F 3d 1130, 1142 (D.C. Cir 1995).

The Notice is Premature as Long as Issues Raised by the Industry Remain Unaddressed

The industry has raised a number of concerns about the proposal. One set of comments set out in an email distributed to USDA and AID representatives, dated April 7, 2005, by H. Keith Powell, Sealift's broker, provided a careful summary of points relating to the proposal. See attached copy. The points raised in this memorandum are fundamental to administration of the entire system and deserve careful consideration. Basically, Mr. Powell points out that the system as contemplated, at least at that time, would not permit carriers to deal with the ordinary kinds of contingencies that are the fabric of ocean carriage. For example, under the contemplated system offers would be tied to an individual vessel. Under the current system, of course, carriers offer individual vessels or named substitutes. The limitation to one vessel is a constraint that seems to come from a computer system, but it obviously will influence not only submission of offers but also the administration of the program. Similarly, under the current system, ocean carriers can identify and price out options and alternatives quite simply in their offers. So, for instance, premiums for additional load or discharge ports may be added and additional costs for auxiliary services such as fumigation or inland transportation can be readily set out. The FBES system would not accept those options readily and would require submission of multiple offers in order to capture those kinds of options. Although there have been indications that certain points raised in the Powell email were or would be addressed somewhere in the process, we do not know whether or how these have been remedied.

The very complexity of the system and the need for testing suggest that these activities should be accomplished *before the industry comment period is closed* so that the interested parties can assess the net effect of these changes.

Adequacy of the Notice

The notice raises a number of legal and policy issues.

The proposed rule relies for authority on 46 U.S.C. app. §1241(b) and 1241f, the Cargo Preference Act of 1954. USDA lacks authority to administer the Cargo Preference Act of 1954 so its reliance on the provision is questionable. Indeed, the method of implementing cargo preference requirements in the proposed system remains unaddressed as yet. Under the current system, for example, if errors are introduced in the process, and later caught by the staff, they can be remedied before the fixtures are finalized; under the new system is not clear whether there is ever contemplated that the computer could err and, if so, what the method of addressing such errors might be. The Notice acknowledges that law mandates "many contract priorities." In one of the most basic mandates, cargo preference, the proposal gives no information as to how it will be administered in the revised system.

At a minimum, Marad, the agency that administers the Cargo Preference Act of 1954, should be a central participant in the adoption in evaluation and adoption of any revised rule not only because of its statutory role but also because of its expertise in the area. We were gratified to learn from the public meeting that Marad will have a prominent role in the crafting of any rule.

The Notice declares at page 74718 that USDA / CCC proposes to "add clarity" to the commodity in evaluation process by eliminating the to the two-step bid process. The Notice does not explain how the amendments would add clarity to the process. The complexities introduced by the proposal, particularly the elimination of the head to head competition, raise some serious question as to whether these changes will achieve the stated goal at the end of the day. In addition, the discussion should evaluate whether the changes will carry new costs, as the Powell email strongly suggests.

The Notice asserts at page 74718 that the new system should reduce ocean freight rates "considerably" because the tonnage would be consolidated by the carriers' bids. Of course, there are strong incentives for consolidation in the current system. Additional incentives for consolidation may yield savings for shippers. Yet, there is nothing in the Notice that explains the basis for the new incentives for consolidation of the carriers' bids provided in this proposal.

The Notice also indicates that the proposed evaluation process will be more efficient, because ocean carriers are expected to offer quantity increments most economical for them. Again, the assertion is not supported by any rationale.

The suggestion in the Notice that delivery times would be reduced because the current freight evaluation process would be streamlined fails to knowledge that the proposal includes another initiative that is contradictory – elimination of one of the two monthly load windows. No rationale is provided for the elimination of one monthly load period. The discussion should candidly address how elimination of one of the two monthly load periods will reduce delivery times.

Conclusion

From Sealift's perspective, the proposed system is premature and untested. It would introduce administrative constraints and burdens on carriers and their brokers that seemed to be disproportionate to the matters sought to be addressed. Beyond that, the rule would not seem to accommodate the flexibility and transparency necessary for carriers to refine their bids to provide vigorous competition. Accordingly, the economic incentives sought may well be frustrated if carriers are so unable to control risks that they may be required to submit less

competitive offers. Sealift urges, therefore, that adoption of any rule be deferred until the system is completed and tested in a structured side-by-side review.

Sincerely,

A handwritten signature in black ink, appearing to read 'T Shea', written in a cursive style.

Timothy B. Shea

-----Original Message-----

From: H. Keith Powell

Sent: Thursday, April 07, 2005 3:47 PM

To: 'Scherl, Denise(M/OAA/TC)'; 'Kenneth Martin'; 'Mark Claar'; 'David Liem'; Nelson Randall (nmrandall@kcc.fsa.usda.gov)

Subject: FBES Presenttition March 31, 2005

Dear All,

First I want to thank all of you for taking the time to meet with the Carriers last week. The discussions proved useful in furthering our understanding of the capabilities and inadequacies of FBES as currently designed. So that we are clear on what was discussed on the key issues, I wanted to summarize these points with my comments and some follow-up questions.

The summary points and my comments are as follows:

1) Time Line – The programming is to be completed in June with internal testing to run from June until December. External testing to be done during the first quarter of 2006 with implementation immediately thereafter.

2) As currently designed, the bids entered into FBES will be tied to an individual vessel. This can present difficulties since many Carriers can not pre-select the performing vessel(s) until the quantity, type of cargo, availability dates and discharge ports are known. It was suggested that the bids be tied to a Carrier so that a carrier has the flexibility to use different vessels to lift the offered quantity. As an example a Carrier may wish to use several vessels to lift a given quantity and can only select the vessels after the award has been made. Alternatively, a Carrier may only wish to use one vessel to lift the awarded quantity, but can only make the decision as to which vessel to use after the awarded quantity, discharge ports and commodity availability dates are known.

3) The "Constraint Group" feature ties individual bids (vessels) together so that the same vessel can not be contracted twice. In certain circumstances this is important and the constraint (or subject) should be tied to individual vessels. In other cases the constraint may need to be tied to the bid (not the vessel) as in cases where a Carrier is offering multiple vessels. Another example where a Carrier may need to put a constraint on two or more bids is where there is a capacity limit (other than the vessel capacity). Therefore, I would suggest that the program allow for a constraint to be placed on a bid in addition to the vessel.

4) It was asked if FBES could be modified to allow for load and discharge port call/cost premiums, discharge port minimum and maximums, and additional quantity ranges (over and above the current four per bid). We were told that based on the current software and hardware limitations, if additional variables were introduced, the "run time" required for the LP to reach a solution would greatly exceed the time limitation for making the commodity awards. We were also told that USDA would continue to look at ways to minimize the "run time" so these and / or other variables can be added to FBES; however at the current time they could not. As an observation, based on Potomac's understanding of FBES, we believe that it is a practical impossibility for us to submit offers in FBES that can approximate the offers that we are currently submitting for several of our clients. In other words, some Carriers will not be able to accurately price out in their bids the voyage duration, voyage distance, number of discharge ports and other cost factors due to system limitations. This will force carriers to work basis their "best guess" or most likely their "worst case" scenarios which we believe will significantly increase cost.

5) It was asked if a discharge port/delivery point premium input screen could be developed so that the various premiums (such as fumigation / stacking charges / inland transportation cost etc...) would not have to be separately entered for each parcel. USDA stated that if this was done every parcel included in the bid would have all the premiums added whether they applied or not and the Carrier would then need to edit the pricing for each parcel. The discussion then centered around having the invitation pre-formatted for the tender terms so that only the applicable premiums would be added to the parcels selected on the bid price page. USDA stated that they could consider doing this for the next version of FBES. It was noted that since FBES requires the Carriers to price each parcel separately that the amount of work to submit a single bid can be substantial. As an example under inv. 045, a single bid to Red Sea / East Africa may require as many as 57 parcel pricing entries. There are seven discharge ports for all of the cargo to this range. If a carrier wishes to submit a separate bid for each unique combination of one up to seven ports it will require 127 separate bids (ie 2 to the 7th power minus one). If the carrier wishes to have an option that allows for a second load port that is another 127 bids. If the carrier wishes to have more than four quantity ranges for each bid then that requires even more bids. As you can see we very quickly reaches an input demand that is completely unreasonable and all of this to replicate what we now can put on a single 4 to 6 page offer. In addition, if Bidders are required to put in multiple offers this could have the same impact on "run time" as having an input screen for these premiums.

6) It was noted that FBES will advertise all cargo under an invitation based on the availability dates for the second shipment period. Moreover it was further noted that Carriers will not be able to offer vessels that have an ETA prior to this second shipment period at port date. Several parties pointed out that this will restrict vessel utilization and could delay cargo loadings. It was suggested that Carriers be given the option to load cargo earlier than the invitation at port date provided the cargo is available to load. No decision was made by AID on this point.

7) It was pointed out that all freight tenders must be issued immediately after the issuance of the Commodity / Freight invitation. USDA/AID stated that the PVO's will be required to issue the freight tenders within 24 hours after the issuance of the invitation.

8) The time line for the release of the invitation, the submission of the freight and commodity offers and the award is as follows:

Day 1 – Commodity / Freight invitation issued

Day 2 – Freight tenders issued

Day 9 – Freight offer due

Day 9 to 14 – PVO review of offers

Day 15 – Commodity bids due

Day 15 – Commodity and Freight award

It was stated by USDA/AID that there can be no modification to the freight offers after their submission, thus if the freight offers are submitted in accordance with the freight tender terms, the PVO review will unlikely result in any bid disqualifications nor can any clarifications sought from the Carriers result in any bid modifications. That said we do not see the need for the PVO to be given 5 days to review the offers. We would suggest that this time be reduced and the time saved be used to extend the Freight offer due date.

9) The observation was made by the Carriers that any DDA's must be fully in accordance with the standardized booking note DDA terms (cls 15) with no modifications. No decision was made by AID on this point.

10) It was noted that FBES currently does not have a copy bid feature; hence a request was made for FBES to have a copy feature whereby a bid from the same invitation can be copied to allow for quicker preparation of additional bids. USDA responded that this could be done. The question was asked if bids from one invitation can be copied for use under a future invitation. USDA stated that copying in this case would be more difficult due to the fact that the parcels differ from one invitation to another. New question - Could all of the bid (except the specific parcels) be copied from one invitation to another?

11) The question was asked if FBES will be compliant with the cargo preference rules and regulations. USDA/AID noted that the system will work the same way as cargo preference is being done today. The observation was then made that under the current two step system a P1 carrier must offer from all loading points or ports to ensure that a P2 bid submitted on the same cargo is not considered as US flag. It was noted that this would lead to most if not all P1 and P2 carriers offering from all loading points / ports. The P1 carriers doing so to ensure that a P2 bid is not considered on the cargo in question, the P2 carrier doing so in hopes that it finds a port or point where no P1 carrier offered. AID asked if there was interest in having an industry meeting

on how FBES would handle Cargo Preference. There was no consensus among the industry participants on AID's request.

12) The question was asked how FBES will optimize the cost of meeting the MSA 17 Great Lakes set aside program. USDA stated that the LP will do a "first run" to consider Lakes purchases absent cargo preference. Then, once the purchase quantity for the Lakes is determined (not to exceed 25 pct of the total invitation), this quantity is placed as a tonnage purchase requirement into the system for the second run. The LP run should then select the exact mix of parcels that has the least impact of the freight rates applicable on the balance of cargo purchased.

End

We also have the following questions:

1) Can we please get an electronic copy of the current program, so that we can see how the screens sequence and interact?

2) Does the program allow for XML web services? Based on my recent conversation with Dave Liem, I understand that it does not. Is it possible for the FBES to be modified for the first version to have XML capabilities?

3) Since it appears that it's USDA/AID's intent to implement FBES according to a fixed time line. Is USDA/AID willing to commit to resolving the major deficiencies to the satisfaction of the industry before implementing FBES?

End

We wish to point out that the above represents our observations and comments based on the recent meetings and our current knowledge of the program. As we continue to study the system, we no doubt will have other questions, suggestions or concerns which we will bring to your attention. FBES represent the most dramatic change to the ocean freight procurement system since the inception of the food assistance programs and we look forward to continuing to work with USDA/AID on this most important project.

We thank you for your review of the above issues and look forward to your response.

Sincerely,

Keith Powell